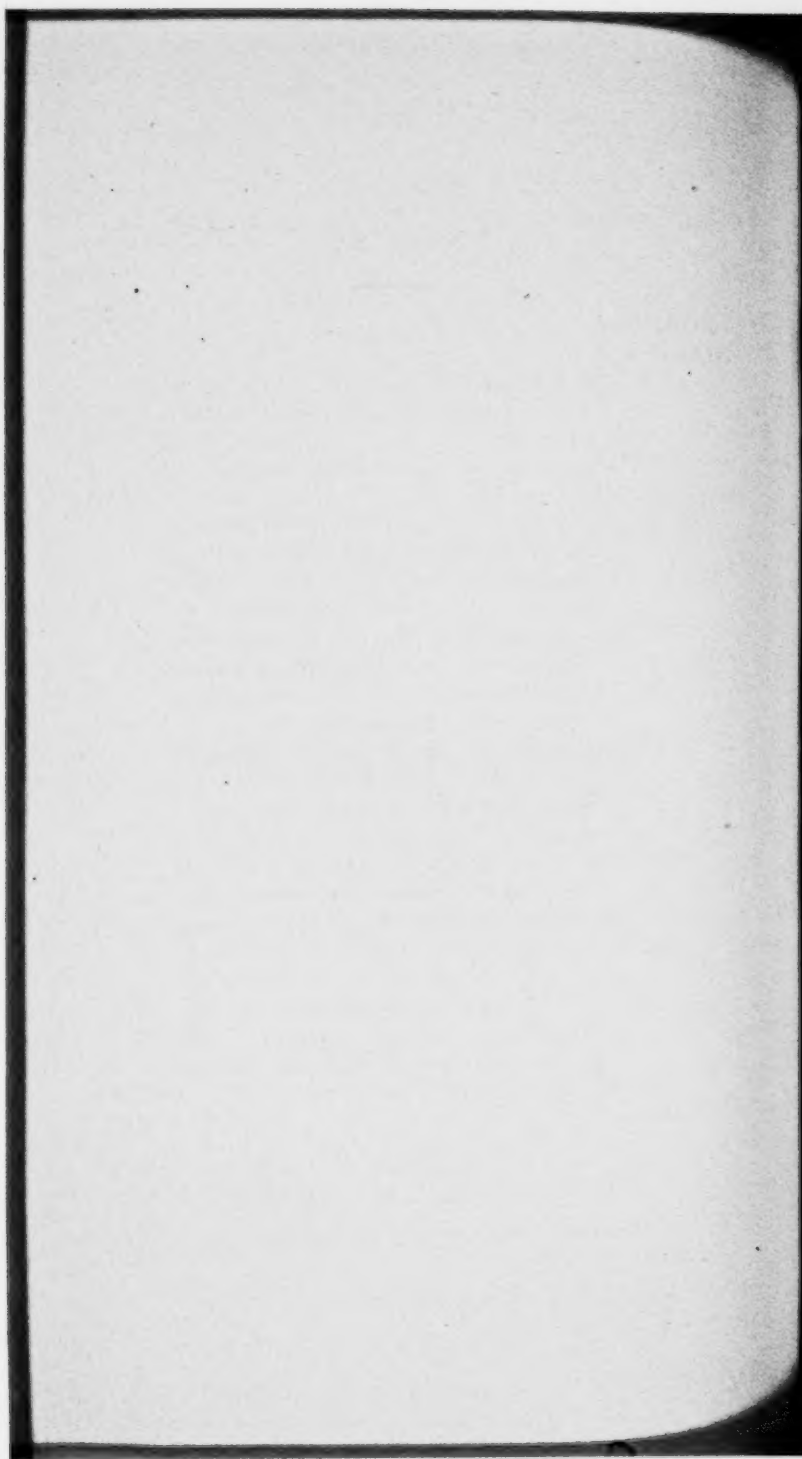


I N D E X .

	Page.
Introduction.....	1
Argument:	
I. The combination pursuant to the agree- ment of February, 1899, was a restraint of trade.....	3
II. These were two railroads and not one....	4
III. The lease was void.....	5
IV. The control exercised before the Sherman Antitrust Act became law would not justify a combination to perfect and to perpetuate such control thereafter.....	5
V. The competition of the Union Pacific Rail- road and its eastern connections did not justify the suppression of the competition of the Central Pacific Railroad.....	6
VI. The action of the Interstate Commerce Commission as to the water lines of the Southern Pacific Company is not incon- sistent with the appellant's position...	7
VII. The United States did nothing in 1899 au- thorizing the appellees to restrain trade.	9
VIII. The Pacific Railroad laws have been violated	10
IX. The principle of the decision in <i>United States</i> <i>v. Union Pacific Railroad Company</i> , 226 U.S. 61, requires a dissolution of the com- bination between the Southern Pacific Railroad and the Central Pacific Railroad	12
X. The lapse of time is not a bar.....	13



In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA, APPELLANT,	} No. 5.
v.	
SOUTHERN PACIFIC COMPANY, CENTRAL PACIFIC RAILWAY COMPANY, UNION TRUST COMPANY OF NEW YORK, et al.	

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF UTAH.*

REPLY BRIEF FOR APPELLANT.

In March and April, 1921, a brief for the appellant, a brief for the appellees, and a supplementary brief for the appellees were filed in this case. No reply brief was filed. The case was argued beginning April 18, 1921. It has been ordered for reargument.

The briefs in the case already filed are long. They deal with the evidence and with the arguments in detail. Most of the arguments for the appellees have been anticipated in the brief originally filed for the appellant. Therefore an effort will be made not to repeat, but to make this reply as far as possible by reference to the original brief.

The facts are outlined at pages 9-18, and the case is summarized at pages 283-286, of the appellant's original brief.

In this reply brief, the appellant submits that—

- I. The combination pursuant to the agreement of February, 1899, was a restraint of trade.
- II. These were two railroads and not one.
- III. The lease was void.
- IV. The control exercised before the Sherman Antitrust Act became law would not justify a combination to perfect and to perpetuate such control thereafter.
- V. The competition of the Union Pacific Railroad and its eastern connections did not justify the suppression of the competition of the Central Pacific Railroad.
- VI. The action of the Interstate Commerce Commission as to the water lines of the Southern Pacific Company is not inconsistent with the appellant's position.
- VII. The United States did nothing in 1899 authorizing the appellees to restrain trade.
- VIII. The Pacific Railroad laws have been violated.
- IX. The principle of the decision in *United States v. Union Pacific Railroad Company*, 226 U. S. 61, requires a dissolution of the combination between the Southern Pacific Railroad and the Central Pacific Railroad.
- X. The lapse of time is not a bar.

I.

THE COMBINATION PURSUANT TO THE AGREEMENT OF FEBRUARY, 1899, WAS A RESTRAINT OF TRADE.

It appears not to be disputed by the defendants (1) that the Central Pacific Railroad with its eastern connections, and the Southern Pacific Railroad with its water lines and eastern connections, are competitive lines of railroad and have been so since 1883; (2) that the area as to which they are competitive is large and the volume of the competitive freight substantial; and (3) that the two companies owning these railroads do not compete and that competition between them, as now related, is impossible.

The vast amount of competitive freight and wide extent of territory of competition (Appts. Br. pp. 23 to 33) may not be conceded, but that the competitive area is large and that the volume of competitive freight is substantial, are no longer in dispute.

The total absence of competition between the two railroads in their present control is indisputable on the evidence. (Appts. Br. pp. 136 to 162; pp. 33 to 109.)

The evidence that the combination creates a monopoly as to certain areas and as to certain classes of freight has not been met and can not be met. (Appts. Br., pp. 109 to 118.)

The burden of the argument for the appellees appears to be—first, that these were one railroad and not two; and, second, that the competition of the Union Pacific Railroad and its eastern connections with the Southern Pacific Railroad excuses the

destruction of any competition by the Central Pacific Railroad. Neither argument is well grounded. (*Infra*, sections II, III, and V.)

II.

THESE WERE TWO RAILROADS AND NOT ONE.

The briefs for the appellees repeatedly assert that the Southern Pacific Railroad and the Central Pacific Railroad were a single railroad. This is argumentative *assertion only*. The evidence is clear. Nowhere is there any denial of the *facts* which show that these were two railroads (Appts. Br. pp. 196 to 234) separately projected by separate and unrelated groups of men; separately aided by gifts of public lands and loans of the public credit under acts of Congress to promote them as two separate competitive systems of railroad; separately owned by separate corporations organized by separate groups of men; separately constructed at the expense of these separate corporations for these separate corporations; separately leased by them under separate leases, making the amount of the rent dependent on the net earnings of the separate railroads; separately controlled by boards of directors, some of whom were always diverse, and a majority of whom were diverse in all but five years between 1865 and 1899; and separately stock-owned always to a substantial extent, and from 1883 to 1899 to the extent of more than a majority of the capital stock in each separate corporation held by widely scattered stockholders in the United States and in Europe.

These were not separate subsidiaries commonly owned by a single corporation or by a single group of men. They were always separately owned. They were separately conceived and separately Government-aided. Such measure of control as was obtained by one over the other prior to 1899 was obtained because competition was foreseen and in order to prevent it (Appts. Br. p. 45; pp. 201 to 206.) This *de facto* control was through a lease only, which was void when made and in danger of being terminated in 1899 by the foreclosure of the underlying liens. (Appts. Br. pp. 40 to 42; pp. 252, 253.)

III.

THE LEASE WAS VOID.

The briefs for the appellees do not disclose any right or power in the Central Pacific Railroad Company to make the lease of February 17, 1885. In 1885 it was void for lack of authority from the Legislature of California and for lack of authority from Congress. (Appts. Br. pp. 237 to 249.)

The lease was cancelled expressly in 1893. The new lease in 1893 was equally void, and was also in violation of the Sherman Antitrust Act. (Appts. Br. pp. 249 to 251.)

IV.

THE CONTROL EXERCISED BEFORE THE SHERMAN ANTI-TRUST ACT BECAME LAW WOULD NOT JUSTIFY A COMBINATION TO PERFECT AND TO PERPETUATE SUCH CONTROL THEREAFTER.

The appellees seem to concede that a control of two separately owned competing railroads before 1890 would not justify the continuance of such a

combination after 1890. They seek to avoid the application of the principle by contending that prior to 1890 there was more than a control—namely, that there was a common ownership. This contention is merely a repetition of the arguments that these were one railroad, and that the lease of the Central Pacific Railroad to the Southern Pacific Company in 1885 put the ownership of the Central Pacific Railroad in the Southern Pacific Company. The answer is that already given—namely, that these were two railroads and not one, and that the lease was void.

Even if the lease had not been void, it would not have justified the more complete combination which was made in 1899 under which the Southern Pacific Company acquired all the stock in the Central Pacific Railroad Company and its successor, the Central Pacific Railway Company. (Appts. Br. pp. 253 to 258.)

V.

THE COMPETITION OF THE UNION PACIFIC RAILROAD AND ITS EASTERN CONNECTIONS DID NOT JUSTIFY THE SUPPRESSION OF THE COMPETITION OF THE CEN- TRAL PACIFIC RAILROAD.

The appellees refer repeatedly to the competition between the Ogden route and the El Paso route. By this they mean the competition of the Union Pacific Railroad and its eastern connections for freight through the Ogden gateway and the competition of the Southern Pacific Railroad for freight through the El Paso gateway. They do not mean—and the evi-

dence would not permit of such a contention—that the Central Pacific Railroad competes against the Southern Pacific Railroad for freight through the Ogden gateway. The Union Pacific Railroad and its eastern connections get what they can for the Ogden gateway. The effort of the Southern Pacific Company, and of the Central Pacific Railway Company under its control, is directed toward the El Paso gateway. There is no competition by the most powerful element in the Central line toward the development of the Central line against the Southern line. (Appts. Br. pp. 34 to 40; pp. 136 to 162.)

This suppression of the competition of the Central Pacific Railroad for the Ogden gateway against the El Paso gateway was accompanied by the usual evils resulting from the suppression of competition. (Appts. Br. pp. 64 to 118.)

This illegality, this injury, is not overcome by the fact that some other competitive railroads remain in a part of the field. (Appts. Br. pp. 52 to 64.)

VI.

THE ACTION OF THE INTERSTATE COMMERCE COMMISSION AS TO THE WATER LINES OF THE SOUTHERN PACIFIC COMPANY IS NOT INCONSISTENT WITH THE APPELLANT'S POSITION.

The appellees make an extended argument based on the decision as to facts, made by the Interstate Commerce Commission on the application of the Southern Pacific Company for permission to continue to operate its water lines from New Orleans and Galveston to New York. This decision is not

in the record in the case at bar. It was made after the decree in the case at bar was entered. It was made on evidence and arguments not in this record. If the decision were injurious to the position of the appellant in the case at bar, it would become necessary to determine whether it can properly be brought to the attention of the court, in the case at bar; but the decision is not injurious to the appellant's position.

Under the terms of the act, on the application of the Southern Pacific Company for permission to continue to operate its steamship lines notwithstanding the competitive rail routes through El Paso and through Ogden, the Interstate Commerce Commission was called upon to determine whether the operation of these steamship lines by the Southern Pacific Company would exclude, prevent, or reduce competition "*on the route by water*" (i. e., by these steamship lines) or would operate to the disadvantage of the public. The commission decided that it would not.

So, far from being inconsistent with the position of the appellant in the case at bar, this decision is favorable to that position. The record in this case shows that the Southern Pacific Company is putting forth its greatest efforts—and has done so for years—in favor of the southern route with its water connections to New York. The thing now complained of is the suppression of the countervailing effort which should exist on the part of the Central Pacific Railroad in favor of the central route. There is nothing

in this situation which would lead the Southern Pacific Company to go slack in the operation of the water lines which form the eastern end of its southern route. To deprive the Southern Pacific Company of that necessary part of the southern route would not increase any competition over either route. On the other hand, it would make the Southern Pacific Company a less efficient and less serviceable competitor of the Union Pacific Railroad and of any other railroad competing for transcontinental business against the Southern Pacific Company.

VII.

THE UNITED STATES DID NOTHING IN 1899 AUTHORIZING THE APPELLEES TO RESTRAIN TRADE.

The appellees fail to meet the position expressed by Judge Carland in the minority opinion below. (Appts. Br. p. 164.) The action of the Settlement Commission has no bearing on the question of whether or not these two railroads were competitive railroads, or whether or not the combination of them would suppress competition. The evidence in this case shows indisputably that they were competitive and that the combination suppressed this competition. The action of the Settlement Commission can not throw light on these facts or overcome this evidence.

The commission's only action was to consent to the refunding of the debt. This was a concession to the Central Pacific Railroad Company. The debt was adequately secured. If the concession had not been made, the road would have been acquired by the

United States or by some other purchaser on foreclosure. The guaranty of the bonds was a proposal of the reorganizers to make them more salable. It was not demanded by the commission. It was not included in the written agreement. It was not thought to be of enough importance to be mentioned in the report which the commissioners made on February 20, 1899, to Congress. It was mentioned incidentally months later in the annual report of the Attorney General. It was never reported to Congress that the Southern Pacific Company was to become the owner of the Central Pacific Railroad or of the stock of the Central Pacific Railway Company. The railroad always has been and now is amply sufficient to pay the amount of the bonds. There is nothing from which it can be said that Congress, or any officers of the United States for it, gave the Southern Pacific Company permission to violate the Sherman Antitrust Act. (Appts. Br., pp. 162 to 196.)

VIII.

THE PACIFIC RAILROAD LAWS HAVE BEEN VIOLATED.

The appellees do not meet the evidence which shows the discrimination which has been practiced by the Southern Pacific Company in the operation of the Central Pacific Railroad against the Union Pacific Railroad. (Appts. Br. pp. 136 to 162.) It is urged for the appellees that the Government is contending that the Pacific Railroad laws required the Central Pacific Railroad Company to give one hundred per cent of its transcontinental freight to the Union

Pacific Railroad. This is not the contention. Such a contention is unnecessary. The Government contends that the Pacific Railroad laws required the Central Pacific Railroad Company to abstain from discriminating against the Union Pacific Railroad. As stated by this court in the Union Pacific case—practices of systematic and preconcerted discrimination in the solicitation and routing of freight adversely to the Union Pacific Railroad violated the Pacific Railroad laws. (Appts. Br., pp. 119 to 132.)

The appellees suggest that this discrimination against the Union Pacific Railroad is "ancient history," and has ceased. All the evidence is against this suggestion. This discrimination was unabated in 1901. From 1901 to 1913 it was tempered somewhat by the Union Pacific Railroad Company's control of the Southern Pacific Company. Even in this period, discrimination continued as to California-Atlantic seaboard freight. This was because the Union Pacific Railroad Company's 46 per cent ownership of the Southern Line, *having the whole of the haul*, gave a greater return than its 100 per cent ownership of the Union Pacific Railroad, having less than a third of the haul. On the dissolution of this combination in 1913 the Southern Pacific Company returned to its pre-merger policy. (Appts. Br., p. 159.) Only two years elapsed thereafter before the evidence in the case at bar was closed (May, 1915). In this period the Southern Pacific Company was restrained by the knowledge that Attorney General Wickersham had informed them in January,

1913, that this suit was to be brought. It was brought in February, 1914. If the period of danger were ended by a decision of this court to the effect that the Southern Pacific Company could continue to hold the Central Pacific Railroad, there is no reason to doubt that the Southern Pacific Company would continue the practices of systematic and preconcerted discrimination in violation of the terms and purposes of the Pacific Railroad laws as defined by this court in the Union Pacific case. The owners and officers of the Southern Pacific Company are human. The old incentive remains. A combination which furnishes a powerful and controlling incentive to such a discrimination, and facilitates it, is in itself in violation of those laws. (Appts. Br., pp. 132 to 136.)

IX.

THE PRINCIPLE OF THE DECISION IN UNITED STATES v. UNION PACIFIC RAILROAD COMPANY, 226 U. S. 61, REQUIRES A DISSOLUTION OF THE COMBINATION BETWEEN THE SOUTHERN PACIFIC RAILROAD AND THE CENTRAL PACIFIC RAILROAD.

The appellees urge at length that the Government contended in the Union Pacific case, and that the court found, that prior to 1901 there was vigorous competition between the Ogden gateway and the El Paso gateway. They urge that such a position and decision are inconsistent with the position now taken by the Government. There is no such inconsistency. (Appts. Br., pp. 259 to 271; p. 34.) On the contrary, the Government now relies on the decision in the Union Pacific case as establishing principles which are conclusive in favor of the petitioner in the case

at bar. The competition which was relied on and which was found to exist in the Union Pacific case was the competition between the Southern Pacific Company promoting the use of the El Paso gateway, and the competition of the Union Pacific Railroad promoting the use of the Ogden gateway. It was not contended that the Central Pacific Railroad, under the control of the Southern Pacific Company, was promoting the use of the Ogden gateway.

On the other hand, the decision in the Union Pacific case established that the Central line, made up of the Central Pacific Railroad, the Union Pacific Railroad, and its eastern connections from California to the Middle West and Atlantic seaboard, was competitive with the Southern Pacific Railroad and its connections between the same territories, and that it was unlawful for a portion of one of the through lines to control the operations of the other through line. This applies to the Central Pacific part of the route just as much as it does to the Union Pacific part of the route. This implication of the decision was apparent to Attorney General Wickersham as soon as the decision was rendered. (Record, vol. 2, p. 785.) Hence this suit. The appellees have failed to point out any distinction in principle between the two cases.

X.

THE LAPSE OF TIME IS NOT A BAR.

The appellees contend that they have made out the defense of laches. This overlooks the fact that the combination was criminal and that there is no de-

fense of laches in such a case. (Appts. Br. pp. 274 to 283.) The Union Pacific combination, which was dissolved by this court, was only two years later (1901), and the Reading combination, which was dissolved by this court in 1920, was three years earlier (1896), than the combination in the case at bar (1899).

There were special reasons for not bringing this suit between 1901 and 1913, because during that period the Union Pacific combination overrode the Southern Pacific combination. (Appts. Br. p. 273.)

Respectfully submitted.

JAMES M. BECK,

Solicitor General.

EDWARD F. McCLENNEN,

JAMES W. ORR,

Special Assistants to the Attorney General.

APRIL, 1922.

○

FILED

APR 19 1921

JAMES D. MAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1920

THE UNITED STATES OF AMERICA,

Appellant,

VS.

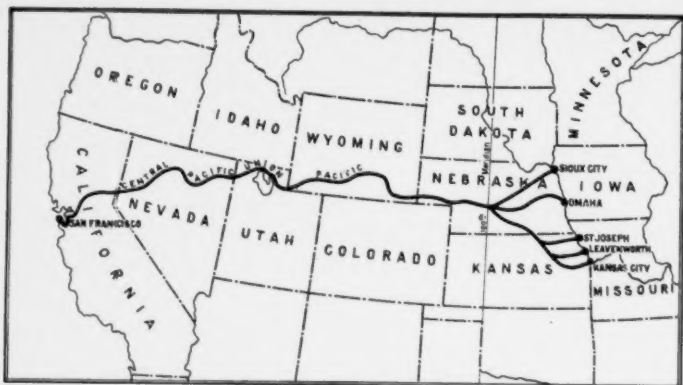
No. 21-5

SOUTHERN PACIFIC COMPANY, CENTRAL

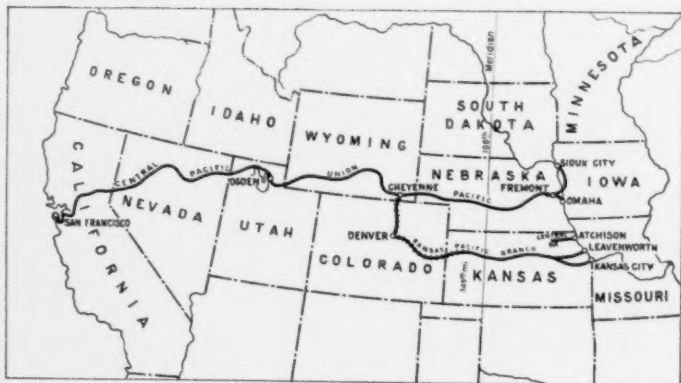
PACIFIC RAILWAY COMPANY, et al.,

Appellees.

THE CONSTRUCTION OF THE CENTRAL PACIFIC
(1861-1872) AND SOUTHERN PACIFIC (1872-1883)
DIAGRAMATICALLY PRESENTED.



PACIFIC RAILROADS AS CONTEMPLATED BY THE
ACT OF JULY 1, 1862.



PACIFIC RAILROADS AS CONSTRUCTED.



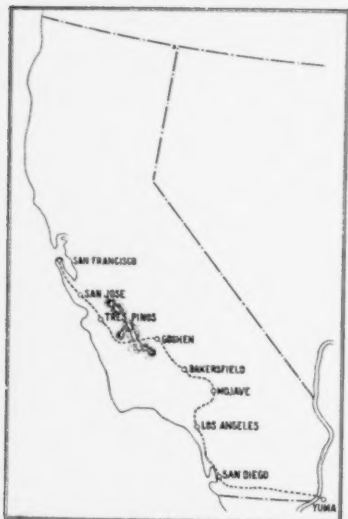
BOND-AIDED LINE.

Central Pacific: Ogden-Sacramento.
 Western Pacific: Sacramento-San Jose.
 (W. P. absorbed by C. P. 1870.)



CENTRAL PACIFIC NON-BOND-AIDED EXTENSIONS.

(Shown in hatched lines.)



APPROXIMATE ROUTE OF SOUTHERN PACIFIC LINE CONTEMPLATED IN ARTICLES OF ASSOCIATION, DECEMBER 2, 1865.



CENTRAL PACIFIC-SOUTHERN PACIFIC ARTERIAL SYSTEM.

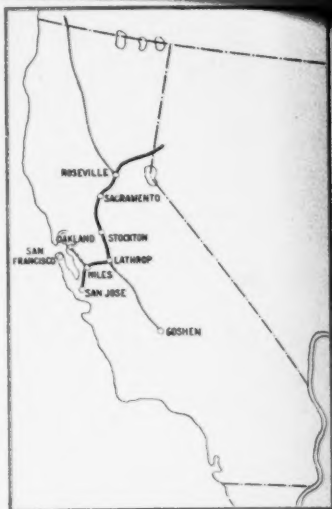
(Constructed under 12 Stat. 489, 14 Stat. 23, 14 Stat. 292, 16 Stat. 573.)

— Central Pacific.
 — Southern Pacific.



BOND-AIDED LINE.

Central Pacific: Ogden-Sacramento.
 Western Pacific: Sacramento-San Jose.
 (W. P. absorbed by C. P. 1870.)

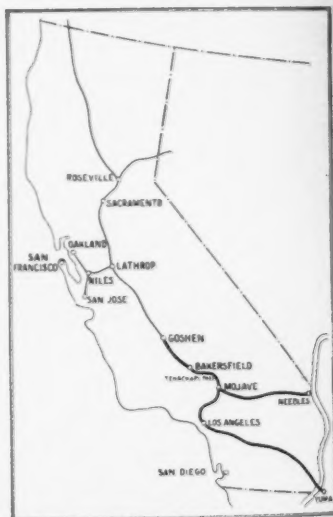


CENTRAL PACIFIC NON-BOND-AIDED EXTENSIONS.

(Shown in hatched lines.)



APPROXIMATE ROUTE OF SOUTHERN PACIFIC LINE CONTEMPLATED IN ARTICLES OF ASSOCIATION, DECEMBER 2, 1865.



CENTRAL PACIFIC-SOUTHERN PACIFIC ARTERIAL SYSTEM.

(Constructed under 12 Stat. 489, 14 Stat. 239, 14 Stat. 292, 16 Stat. 573.)

— Central Pacific.
 — Southern Pacific.



PHOTOGRAPHIC RELIEF MAP OF CALIFORNIA.

IN THE
Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
Appellant,

against

SOUTHERN PACIFIC COMPANY, CENTRAL
PACIFIC RAILWAY COMPANY, UNION TRUST COMPANY OF
NEW YORK, *et al.*,

Appellees.

No. 21.
October
Term 1920.

**BRIEF FOR UNION (NOW CENTRAL
UNION) TRUST COMPANY OF NEW
YORK, APPELLEE.**

This suit was brought upon the theory that the ownership by the Southern Pacific Company of the capital stock of the Central Pacific Railway Company, and the lease by the latter of its lines to the former, constitutes a combination in restraint of trade; and the petitioner has requested that the said Southern Pacific Company be directed to dispose of the said capital stock which was pledged long ago with the said Union Trust Company, as trustee for bondholders.

Facts.

The facts bearing upon the issue as to whether the ownership of the capital stock of the Central Pacific Railway Company by the Southern Pacific Company constituted a combination in restraint of trade under the terms of the Sherman Anti-trust Act will be set forth in the brief submitted on behalf of those parties.

The facts relating to the pledge and present situation of the said stock are as follows (the references, unless otherwise indicated, being to the pages of the printed record): On August 1st, 1899, a mortgage or deed of trust was made by and between Southern Pacific Company and the Union Trust Company of New York by the terms of which the said Southern Pacific Company agreed to pledge and deposit with the said Union Trust Company of New York certificates of the preferred stock of the Central Pacific Railway Company to the amount at its face value of \$12,000,000, and certificates of the common stock of said company to the amount at its face value of \$67,274,200, the said certificates to be assigned in blank with irrevocable powers to transfer the same; and it was provided and agreed that the certificates so pledged and deposited should be held by the said Union Trust Company of New York, subject to the terms and conditions expressed in said instrument, upon trust for the benefit of the persons who should become holders of the bonds to be issued under said mortgage, to secure to such holders the punctual payment of the said bonds and the interest thereon as it should become due; and it was further provided and agreed that additional preferred stock of said

Central Pacific Railway Company, not exceeding in the aggregate \$8,000,000, should be deposited in a similar manner, and upon the same terms, conditions and trusts, with the said Union Trust Company of New York when delivered from time to time to the said Southern Pacific Company. (Mortgage, Defendants' Exhibit No. 98, pp. 2304-25).

Pursuant to the terms of said instrument the said Southern Pacific Company has deposited with the said Union Trust Company of New York, as trustee as aforesaid, certificates of preferred stock to the amount at its face value of \$17,400,000, and certificates of common stock to the amount at its face value of \$67,274,200, of the said Central Pacific Railway Company, the said certificates being assigned in blank with irrevocable power to transfer the same.

Bonds secured by the said mortgage have been issued and there are now outstanding such bonds secured by said mortgage to the amount of \$34,218,500 (1220-21) which bonds will not become due until August 1, 1949.

It should be noted that since this appeal was taken (*i. e.*, on June 18, 1918) the respondent Union Trust Company of New York was merged into the Central Union Trust Company of New York.

Pleadings.

The bill of complaint sets forth as against the trustee only the execution of the mortgage by the Southern Pacific Company to Union Trust Company of New York to secure \$36,818,500 of bonds, the pledge of practically all of the stock of the Central Pacific Railway Company to secure the

payment of said bonds, and the holding by the said trustee of said stock as collateral security for said indebtedness (2, 5). There is, of course, a prayer for general relief; but *no specific relief against the trustee is asked for*, although it is prayed that the Central Pacific Railway Company be enjoined "from recognizing as valid any transfer, mortgage, pledge or assignment of such stock by said Southern Pacific Company," etc. (11, 12).

The answer of the trustee prayed that if any relief should be granted to the petitioner, the decree should "not in any way affect the lien of the mortgage" (80).

POINT I.

This court should affirm the decision of the court below and should not direct that the stock be sold.

That the ownership of the capital stock of the Central Pacific Railway Company by the Southern Pacific Company is not contrary to the terms of the Sherman Anti-trust Act will be argued fully in the brief submitted on behalf of the Southern Pacific Company. There seems to be no occasion, therefore, for this trustee to do more than to point out that its position on this subject is the same as that of the Southern Pacific Company since the interests of the bondholders which it represents are opposed to such a sale.

The said stock of the Central Pacific Railway Company is pledged with this trustee to secure absolutely, or at any rate as far as possible, the re-

payment to the bondholders in the year 1949 of the sum of \$34,218,500, advanced by them, and the interest thereon. So long, therefore, as this stock has a *market* value of well over \$34,218,500 the bondholders will be protected. Still further, the Central Pacific Railway Company would seem to be such an important part of the system now operated by the Southern Pacific Company, that the latter Company, and any successor, can not permit the stock of the Central Pacific Company to be sold by the trustee under any circumstances. If, however, it should be decreed that the Southern Pacific Company must sell this stock, and cannot thereafter repurchase it, it would follow, in the event of a foreclosure of the mortgage, that the stock would have, practically speaking, no "market" value at all, since the only probable purchaser would be the Union Pacific Railroad Company; and we may be reasonably sure that the Union Pacific Railroad Company would not pay as much for the stock of the Central Pacific Railway Company, if bidding alone, as it would in competition against another company.

If therefore we are right in thinking that a decree directing that this stock cannot now or hereafter be owned by the Southern Pacific Company would be equivalent to a decree that the stock must be owned by the Union Pacific Railroad Company, then it follows, we urge, that such a decree would very greatly impair the value of the stock which has been pledged with this trustee.

POINT II.

If this court should reverse the decision of the court below and direct a sale of the stock, the interests of the bondholders should be fully protected.

A. IF THE STOCK IS TO BE SOLD IT SHOULD BE SOLD SUBJECT TO THE LIEN OF THE DEED OF TRUST.

It seems hardly conceivable that the Government, in seeking to compel the Southern Pacific Company to sell this stock, should attempt also to destroy the lien of the bondholders; and no such claim has been made in the bill of complaint, or in the court below, or in the brief for the Government in this court. It has happened, however, that the requests of the trustee that the Government disclaim any intention to ask that the lien be destroyed, or stipulate to that effect, have been refused. It seems necessary, therefore, to make a brief statement of the position of the trustee. This is so especially, because to both the Government and the Southern Pacific Company the tremendous question is whether the stock shall be sold, and the question whether if sold the sale shall be subject to the lien of the trustee is to them of comparatively trifling interest. That question, however, is of great importance to the bondholders as we have intimated above.

The Southern Pacific Company, as the owner of this stock, had the power to sell it, and therefore to pledge it. If, instead of raising money by *pledging* this stock, the Southern Pacific Company had *sold* some of it, the situation of the purchaser

would be the same, in substance, as that of the pledgee here. The Government in that case would hardly attempt, for reasons of convenience or otherwise, to compel the purchaser to sell back his stock to the same person who had bought, or might wish to buy, the balance of the stock. So here, the Government if it had made out a case, might have asked this court to direct the Southern Pacific Company to sell *whatever interest it still had* in the stock, but *not*, of course, any *interest with which it had already parted*. To be sure the trustee has been made a party to this suit; but the reason for compelling the Southern Pacific Company to dispose of its interest (or equity) in the stock has no application whatever to the Central Union Trust Company of New York and its interest in (or lien upon) the stock.

If this suit, *instead* of being brought for the purpose of requiring the Southern Pacific Company, (because a competitor of the Union Pacific Railroad Company) to *dispose* of its interest in the stock of the Central Pacific Railway Company, had been brought in the exercise of the power of *eminent domain* to enable the Government to obtain the ownership of this stock for itself, then the trustee would have been a proper party, and the decree might determine the amount which should be paid to it in satisfaction of its lien upon the property.

In the case at bar, however, since the Southern Pacific Company has power only to sell its undisposed of interest in the stock, that is all that this court could have been asked to compel that Company to do. But if it is conceivable that the Southern Pacific Company may be required to sell an

interest which it has disposed of already, there is no occasion to make a direction that the stock be sold free from the lien, as a purchaser of the stock should be willing to take it subject to the trust deed.

We have urged above, in substance, that *even if* the Government had asked to have the stock sold free from the lien of the mortgage, such relief could not under any circumstances be granted. The facts are, however, that the Government in its complaint did *not* pray to have the lien of the trustee destroyed, and that, although the position of the trustee on that subject was at once asserted in its answer, the Government has not made any claim to the contrary, either in the court below or in its brief in this court. It has thus waived any right to such relief.

B. IF THE STOCK IS TO BE SOLD, AND FREE FROM THE LIEN OF THE MORTGAGE, IT SHOULD BE ONLY AT A PRICE SUFFICIENT TO PAY THE INDEBTEDNESS SECURED BY THE STOCK WITH INTEREST TO THE DATE OF MATURITY OF THE BONDS.

While, as we have said above, this is not a condemnation proceeding, and the trustee ought not therefore to have its rights in this stock taken from it without its consent, or sold in any way except under its direction, yet, if its right to control the time and terms of sale of the pledged property should be thus taken from it, the decree should provide—at least—that the sale be made only upon such terms and with such safeguards as will absolutely insure the payment of all indebtedness

to the bondholders and all interest to the date of its maturity.

Respectfully submitted,

PERRY D. TRAFFORD,
JAMES GORE KING,

Of Counsel for UNION (NOW CENTRAL
UNION) TRUST COMPANY OF NEW
YORK.



Supreme Court of the United States

OCTOBER TERM, 1920

THE UNITED STATES OF AMERICA,

Appellant,

VS.

NO. 5

SOUTHERN PACIFIC COMPANY, CENTRAL

PACIFIC RAILWAY COMPANY, et al.,

Appellees.

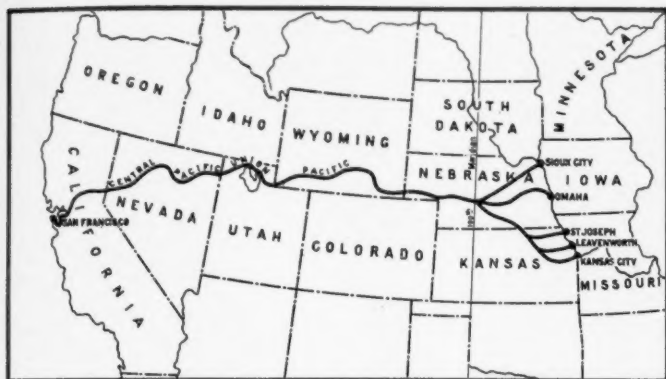
MAPS PREPARED BY APPELLEES



INDEX

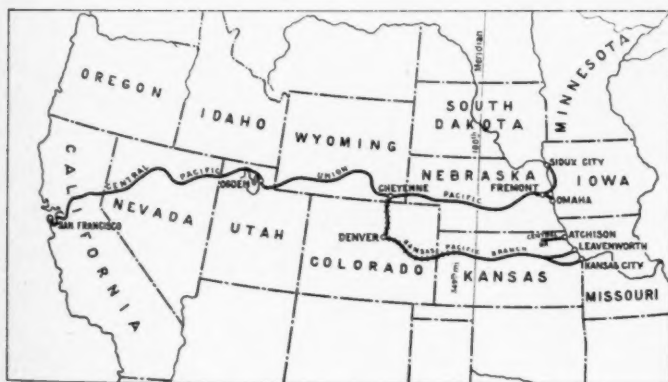
- I. Pacific Railroads as Contemplated by the Act of July 1, 1862.
- II. Pacific Railroads as Constructed.
- III. Bond-Aided Line: Ogden-Sacramento-San Jose.
- IV. Central Pacific Non-Bond-Aided Extensions.
- V. Approximate Route of Southern Pacific Railroad Company's Line, Contemplated in the Articles of Association, December 2, 1865.
- VI. Central Pacific-Southern Pacific Arterial System.
Showing the four lines to the Boundaries of California authorized by Congress.
- VII. Eastern Rail Connections of the Southern Pacific.
- VIII. Northern Division of Southern Pacific Railroad Company as it existed in 1873, and its relation geographically to the Central Pacific-Southern Pacific Arterial System.
- IX. Southern Pacific Company's Coast Line opened 1901. San Francisco-Los Angeles.
- X. San Joaquin Valley Lines.
- XI. Routes between Sacramento and San Francisco.
- XII. Rail Connection between Tehama and Portland.
- XIII. Union Pacific Lines to the Pacific Coast, and their relation geographically to the Central Pacific Main Line.
- XIV. Union Pacific Lines to the Pacific Coast, and their relation geographically to the Central Pacific Main Line, Feeders and Extensions.
- XV. Photographic Relief Map of California.
- XVI. Southern Pacific System.





I.

PACIFIC RAILROADS AS CONTEMPLATED BY THE
ACT OF JULY 1, 1862.



II.

PACIFIC RAILROADS AS CONSTRUCTED.





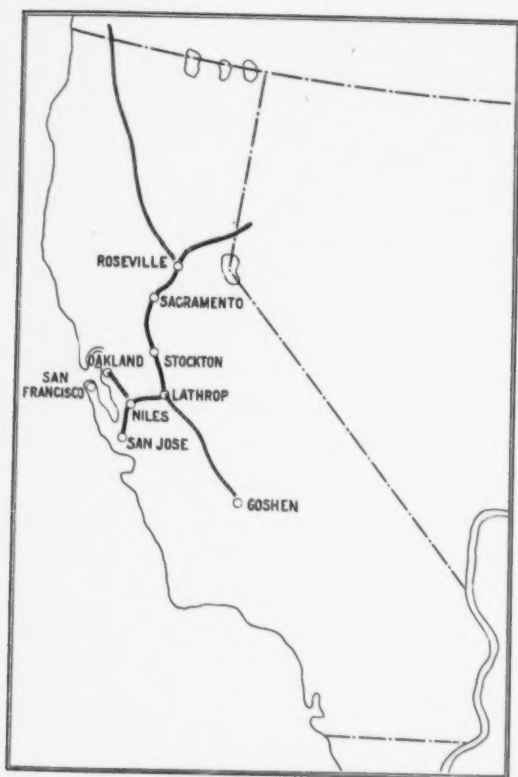
III.

**BOND-AIDED LINE: OGDEN-SACRAMENTO-
SAN JOSE.**

**Ogden-Sacramento: Central Pacific Construction.
Sacramento-San Jose: Western Pacific Construction.**

Note: The Western Pacific was absorbed by the Central Pacific in the consolidation of June 23, 1870.





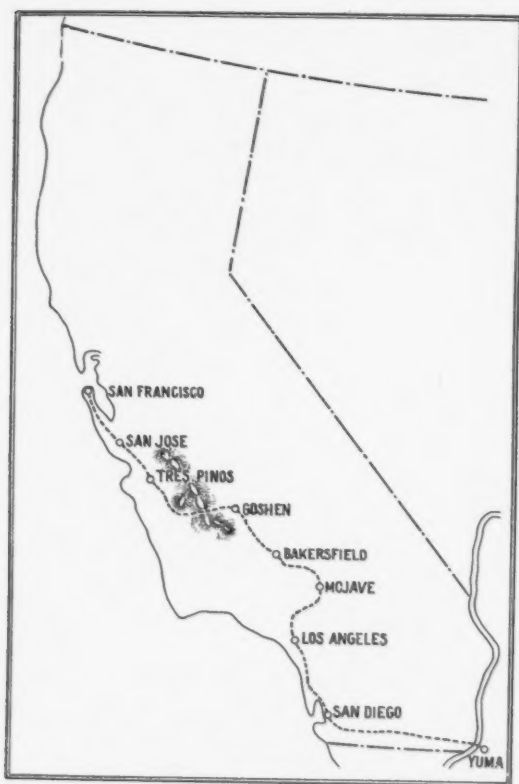
IV.

CENTRAL PACIFIC NON-BOND-AIDED EXTENSIONS.

1. Roseville-Oregon line.
2. Niles-Oakland.
3. Lathrop-Goshen.

— Non-bond-aided extensions.
 — Main bond-aided line.

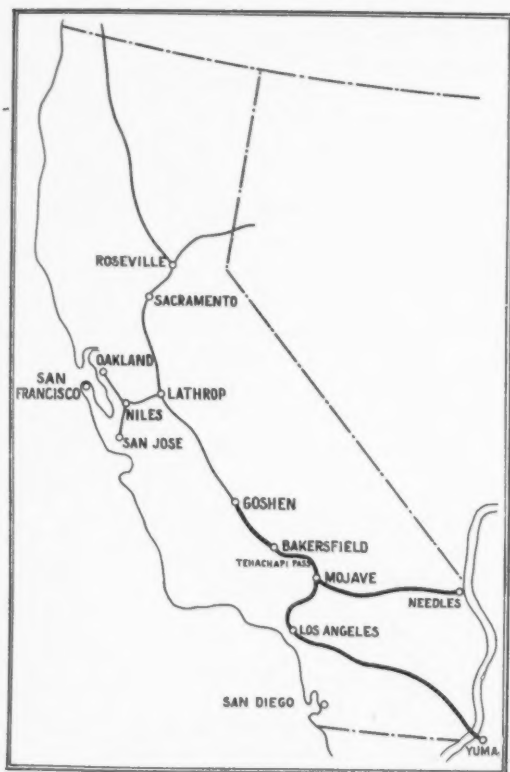




V.

APPROXIMATE ROUTE OF SOUTHERN PACIFIC
RAILROAD COMPANY'S LINE, CONTEMPLATED
IN THE ARTICLES OF ASSOCIATION, DECEM-
BER 2, 1865.





VI.

CENTRAL PACIFIC-SOUTHERN PACIFIC ARTERIAL SYSTEM.

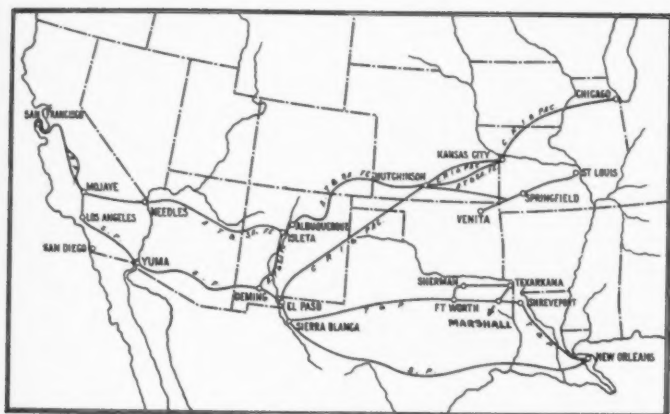
Showing the four lines to the boundaries of California authorized by Congress:

1. Sacramento-Ogden: Act of July 1, 1862 (12 Stat. 489).
2. Roseville-Oregon Line: Act of July 25, 1866 (14 Stat. 239).
3. Goshen-Mojave-Needles: Act of July 27, 1866 (14 Stat. 292).
4. Mojave-Los Angeles-Yuma: Act of Mar. 3, 1871 (16 Stat. 573).

— Central Pacific.
 — Southern Pacific.

(Note: The Mojave-Needles line was leased by the Southern Pacific to the Santa Fe when completed in 1883, and was purchased by the Santa Fe in 1911.)

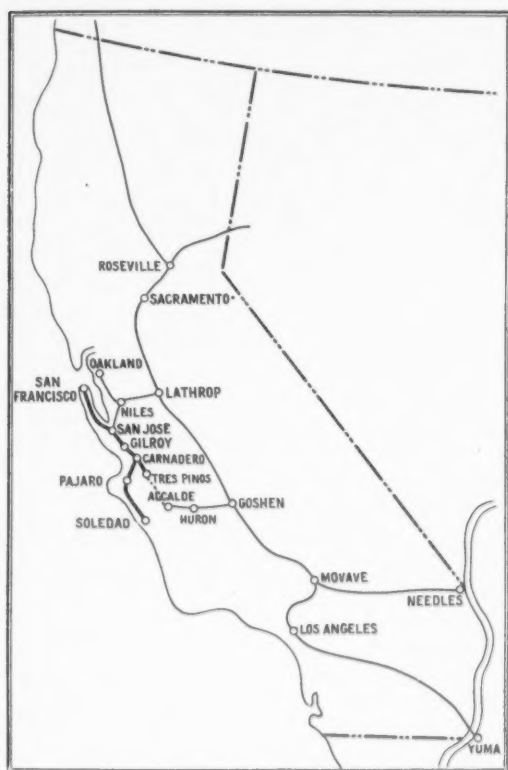




VII.

EASTERN RAIL CONNECTIONS OF THE SOUTHERN PACIFIC.



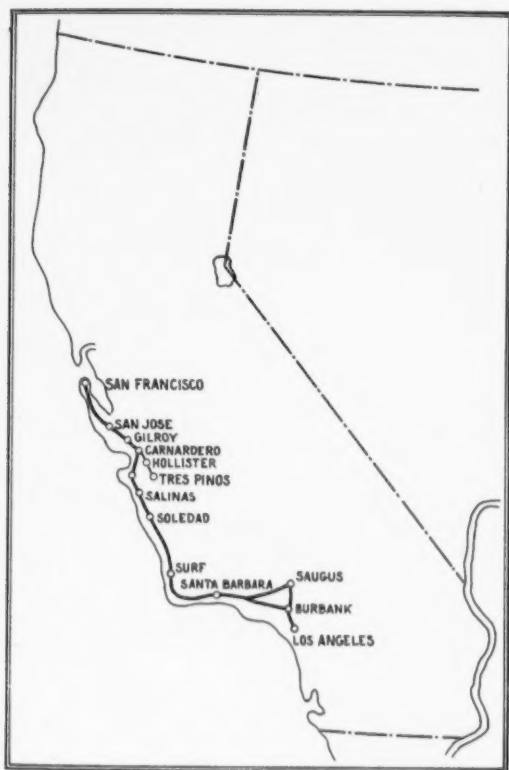


VIII.

NORTHERN DIVISION OF SOUTHERN PACIFIC RAILROAD COMPANY AS IT EXISTED IN 1873, AND ITS RELATION GEOGRAPHICALLY TO THE CENTRAL PACIFIC-SOUTHERN PACIFIC ARTERIAL SYSTEM.

- Northern Division of Southern Pacific Railroad Co.
- - - Central Pacific-Southern Pacific Arterial System.
- · · · · Unbuilt connection between Tres Pinos and Alcalde.





IX.

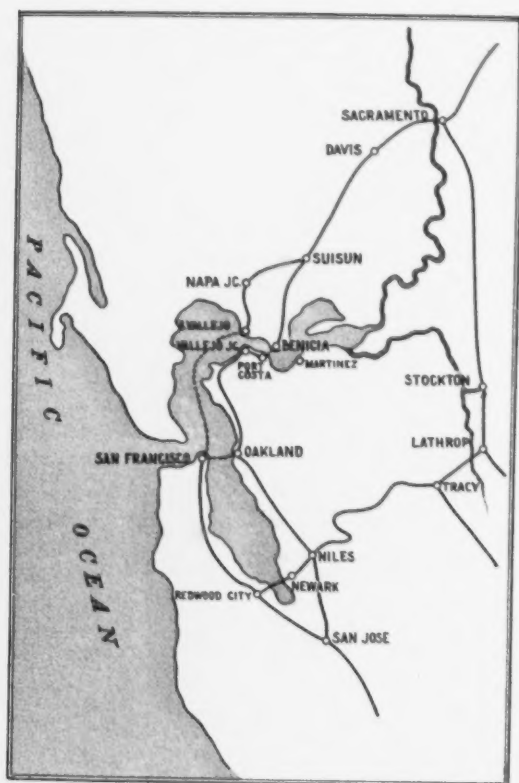
SOUTHERN PACIFIC COMPANY'S COAST LINE
OPENED 1901. SAN FRANCISCO-LOS ANGELES.



X.

SAN JOAQUIN VALLEY LINES.

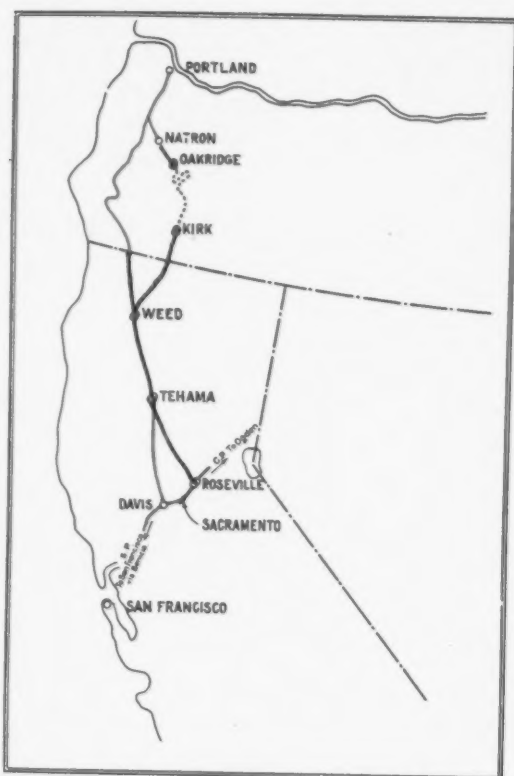
1. Main Line (C. P.): Lathrop-Goshen (1872).
2. West Side Line (S. P.): Tracy-Ingle-Kerman-Armona-Goshen (1891).
3. West Side Line (S. P.): Tracy-Ingle-Kerman-Fresno-Goshen (1892).



XI.

ROUTES BETWEEN SACRAMENTO AND SAN FRANCISCO.

1. Sacramento-Lathrop-Niles Oakland-San Francisco.
2. Sacramento-Napa Junction-South Vallejo-San Francisco.
3. Sacramento, via Benicia cut-off-Suisun-Benicia-Oakland-San Francisco.
4. Sacramento-Lathrop-Niles-San Jose-San Francisco.
5. Sacramento-Lathrop-Niles, via Dumbarton cut-off-Newark-Redwood-San Francisco.



XII.

RAIL CONNECTION BETWEEN TEHAMA AND PORTLAND.

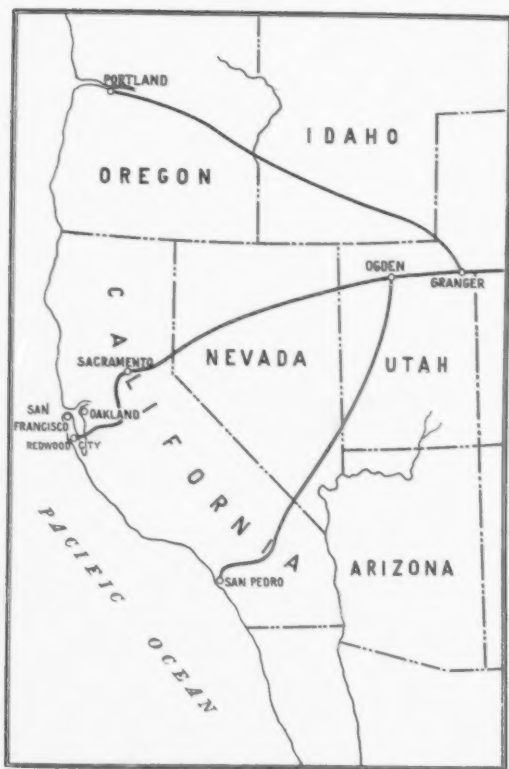
- Southern Pacific.
- - - Central Pacific.
- . - Central Pacific-Unfinished section.

N. B. Tehama is the most northerly point in California reached by the Southern Pacific over its own rails; all points in California north of Tehama are reached by Central Pacific rails only.

San Francisco to:	Miles
Tehama—S. P. via Benicia and Davis	186
Tehama—S. P. to Sacramento, C. P. via Roseville ..	212

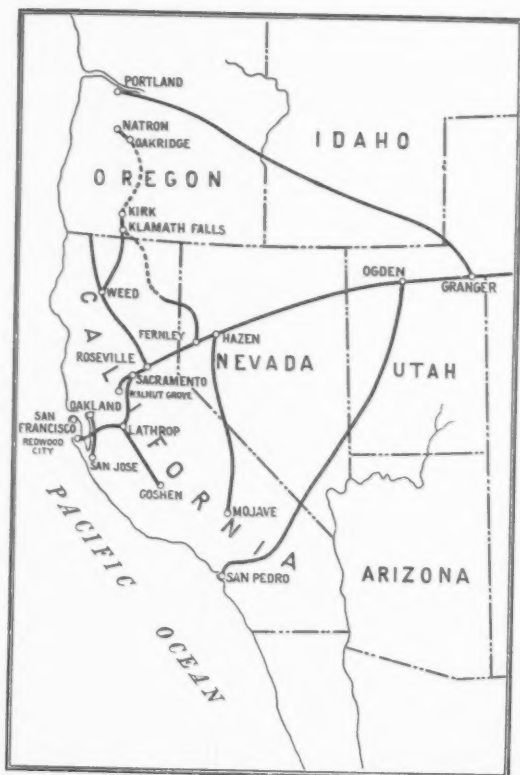
Tehama to:	Miles
Red Bluff	12
Redding	46
Delta	112
Weed	163
Oregon State Line	217





XIII.

UNION PACIFIC LINES TO THE PACIFIC COAST.
AND THEIR RELATION GEOGRAPHICALLY TO
THE CENTRAL PACIFIC MAIN LINE.



XIV.

UNION PACIFIC LINES TO THE PACIFIC COAST,
AND THEIR RELATION GEOGRAPHICALLY TO
THE CENTRAL PACIFIC MAIN LINE, FEEDERS
AND EXTENSIONS.



XV.

PHOTOGRAPHIC RELIEF MAP OF CALIFORNIA.

MAPS

TOO

LARGE

FOR

FILMING

Office Supreme Court, U. S.

FILED

APR 19 1921

JAMES D. MAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1920.

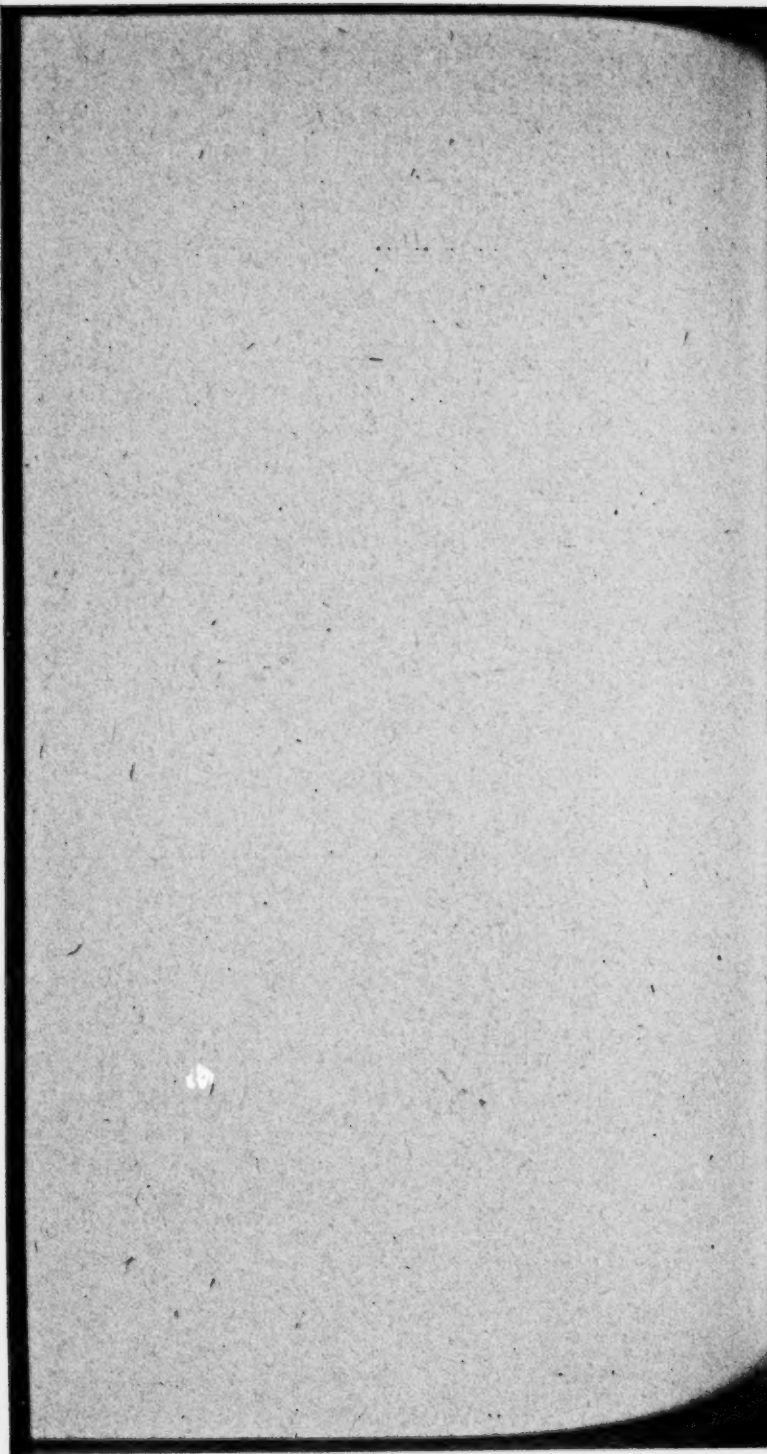
THE UNITED STATES OF AMERICA,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
CENTRAL PACIFIC RAILWAY COMPANY, et al.,
Appellees.

OUTLINE OF ORAL ARGUMENT FOR APPELLEES.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 21.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

SOUTHERN PACIFIC COMPANY, CENTRAL PACIFIC
RAILWAY COMPANY, ET AL., APPELLEES.

OUTLINE OF ORAL ARGUMENT FOR APPELLEES.

Introduction.

The date of the alleged conspiracy to suppress competition is February 20, 1899. The outstanding events which occurred on that day were these:

(a) The Secretary of the Treasury, Secretary of the Interior, and Attorney General, as a Commission created by the act of July 7, 1898, reported to both Houses of Congress the settlement of the Central Pacific debt amounting to \$58,812,715.48 under an agreement between the United States of

America, the Central Pacific Railroad Company, and Messrs. Speyer & Company, dated February 1, 1899, and executed February 15 and 16, 1899, by President McKinley and the three Cabinet officers. A copy of the agreement was appended to the report. (See Report, Main Br.,* p. 176; also Agreement, which is a part of the Answer, I. R., 47.)

(b) Speyer & Co. put out to the world the plan of reorganization of the Central Pacific properties, dated February 8, 1899, upon which the agreement with the Government was based, and in that plan stated that under an agreement with the Southern Pacific Company, copies of which were available to persons in interest, the latter company had agreed to buy the common stock and the preferred stock of the proposed new company and to guarantee the payment of two issues of bonds of the new company, i. e., (a) an issue of one hundred million, whereof fifty-eight million were allocated as security for the payment of the Government debt, and (b) an issue of twenty-five million, applicable immediately, with other assets, to the discharge of the general bonded indebtedness of the old company. (See Plan, in Answer, I. R., 60.) The agreement and the plan of reorganization were integral parts of a single transaction (Main Br., 149-176, 294-302) which was long the subject of negotiation as shown by the fact that there were twenty or thirty revisions of the plan (Main Br., 180).

The Department of Justice now urges that this transaction, participated in, as we have seen, by the President of the United States and three members of his Cabinet, was an unlawful conspiracy for the suppression of competition.

*Brief for Appellees.

The argument is made that the Southern Pacific suppressed competition by preventing it from coming into existence, and that it accomplished this result by the payment to the Government of its debt. The argument is that, had the Government not been paid its debt, it would have foreclosed and, as a purchaser at foreclosure, would itself have become a competitor, or the property might have passed into the hands of third persons who would have become competitors. In other words, the Department of Justice discovers an illegal prevention of competition from coming into existence in the fact that the Government chose to accept payment instead of foreclosure. The Department of Justice, therefore, is seeking to nullify Government action of the most formal and important character and to do so by most attenuated argument—by an argument indeed which all the time overlooks the fact that, as the holder of the leasehold interest in the properties of the Central Pacific, the Southern Pacific would have been entitled to bid at the foreclosure sale or to have redeemed in protection of its theretofore lawfully acquired interest.

Outstanding Propositions in the Case.

There are several outstanding propositions upon which we think this case should turn, and which lend themselves readily to oral argument. We here enumerate seven of these propositions, noting that the lower court sustained our position in respect of each of them:

(1) Reading the record in the light of the history of the railroad systems of the country, viewing this particular system in the light of its own history and considering the phys-

ical aspect of the system by an inspection of the map, it is immediately apparent that the lines here sought to be divorced present the case of a single system of railroads. The case, therefore, does not involve any combination of competitive units or any combination at all, inasmuch as the Southern Pacific and Central Pacific lines were projected and built and have been operated since their origin as one property.

(2) At the time of the passage of the Anti-trust Act (July 2, 1890) the Southern Pacific and Central Pacific lines were owned by a single proprietor, although the Central Pacific lines were held under a 99-year lease, made February 17, 1885, instead of in fee; but "it is obvious that in principle the right of a lessee is the same as that of a purchaser in fee" (224 U. S., 565).

(3) *In view of the proceedings in Congress during the period 1885 to 1898 (covering both administrations of President Cleveland, the administration of President Harrison, and the first fifteen months of the first administration of President McKinley) respecting the Southern Pacific and Central Pacific lines, and considering that during this same period Congress was fully acquainted with the existence of the lease of 1885 and subsequent modifications, and had frequent occasion to deal therewith, and with the relations between the Southern Pacific and the Central Pacific, it is plain to see that the act of July 7, 1898 (30 Stat., 652, 659), creating the Commission for the settlement of the Central Pacific debt, contemplated as natural, if not inevitable, the agreement subsequently made; and by its own terms the statute invested the Commission with full authority to agree*

to the plan which was adopted for the payment of the indebtedness, including (a) the provision by which the Southern Pacific acquired the stock of the Central Pacific, and (b) the provision taking account of the lease made to the Southern Pacific in 1885 and subsequent modifications, whereby it was provided that all leases should be subordinated to the lien of the new mortgage to secure the bonds which were to be delivered to the Government as collateral for the notes given in settlement of the debt.

(4) Considering that the settlement dated February 1, 1899, but executed February 16, 1899, under the act of July 7, 1898, and all the details thereof were matters of public history and necessarily within the knowledge of Congress (see Report made to both Houses of Congress February 20, 1899, the plan publicly issued by Speyer & Co. February 20, 1899, and the publication of the full details thereof in *The Commercial & Financial Chronicle* of February 25, 1899), the acts of March 3, 1899, and March 3, 1901, are to be treated as Congressional confirmation and recognition of and acquiescence in the settlement as made. This argument is fortified by the circumstance that from February 20, 1899, to the commencement of this suit, February 11, 1914 (fifteen years), no suggestion was ever made that the settlement was beyond the power of the Commission in any of its details, or that the Government had been overreached in respect of any of the provisions therein involved.

(5) The control of the Central Pacific lines by the Southern Pacific Company does not constitute or give rise to an undue restraint of commerce, for the following reasons:

(a) As stated by Mr. Justice Holmes in the Swift case quoted by Mr. Justice Day in the Union Pacific case, "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business" (Supp. Br.,* 107), and judged by conditions which had their origin thirty-six years ago (1885), it is established as a fact that the ownership by the Southern Pacific of the Sunset-Gulf route and the Central Pacific does not involve an undue restraint of commerce.

(b) This very argument *upon this question of fact* was successfully made by the Government in the Union Pacific case (Main Br., 318-320), but the Government now seeks to establish the very contrary.

(c) The fact that the railroad system under consideration involves no *undue* restraint of commerce is established by the direct testimony of witnesses of experience whose testimony is in harmony with the Government contentions in the Union Pacific case.

(d) This testimony is corroborated and confirmed by evidence that it is impossible to dismember the Southern Pacific-Central Pacific system without substantial deterioration in the service (Main Br., 375-380), as shown by a finding to that effect by the Railroad Commission of California, which declared that it was problematical whether such a dismemberment would at all improve interstate commerce, and that it was certain to inflict material injury upon commerce moving wholly in California—a view with which the court below agreed (Main Br., 380).

"The Central and Southern Pacific Railroads are so thoroughly bound together that no man can fore-

*Supplemental Brief for Appellees.

see the result of tearing them asunder" (The President of the University of California, in The Outlook, 1914, Vol. 106, p. 609).

(6) There was no violation of the Pacific Railroad Laws because:

(a) "The proofs show no foundation in fact for this contention" (Hook, J., quoted, Main Br., 372).

(b) The argument that the Pacific Railroad Laws forbid one of the constituent roads to compete with another constituent road, or become the property of a competitor, has no foundation whatever in the statute.

(c) As held below, "the Government and the public were being served adequately." The Central Pacific, in point of maintenance and operation, ranks with the best railroads of the country, and although the Government called the Union Pacific officials as witnesses, they could not testify that service could be improved by dismemberment or that the Union Pacific would get any more traffic or revenue after dismemberment than they now obtain.

(d) The argument of the Government respecting the Pacific Railroad Laws flies in the face of that portion of the Union Pacific decision which affirmed the validity of the ownership by the Union Pacific of the Granger-Portland route and the acquisition of a fifty per cent interest in the Ogden-San Pedro route (Main Br., 267, Maps XIII and XIV).

(e) The Government's contentions respecting the requirements of the Pacific Railroad Laws is contrary to long-continued administrative construction. Indeed every department of the Government has, at one

time or another, declined to regard as violative of the statutes the very conditions and conduct which in this suit are charged to be prohibited.

(f) The cause of action under the Pacific Railroad Laws when analyzed does not present the Government in the light of a person aggrieved but suggests a liability over to the Union Pacific (see quotations from Acts of 1862, 1864 and 1874, Supp. Br., 152-155) which that company shows no disposition to pursue and which, if the liability existed, would be remediable through the Interstate Commerce Commission, and, if need be, in a District Court upon petition by the Interstate Commerce Commission—all as provided in the Transportation Act of 1920 (Supp. Br., 177, 202).

(7) In its last analysis the relief sought by the appellant is experimental and not judicial in its nature. The Government does not seek the destruction of a new and unlawfully created condition which took the place of an old and natural one; it seeks the destruction of an old and natural condition in order that it may create, by a new and untried experiment, a condition which has no prototype.

The Government's Petition and Incorrect Definitions Respecting Fundamental Matters.

The petition or bill of complaint presents a two-fold case (a) under the Anti-trust Act and (b) under the Pacific Railroad Laws.

(1) The case under the Anti-trust Act is based upon the allegations (a) that prior to 1885 competitive conditions ex-

isted between the Ogden route (meaning the C. P., U. P. and eastern connections) and El Paso (meaning the Sunset Gulf route); (b) that by the lease of 1885 this competition was suppressed, and (c) that the stock acquisition of 1899 was an additional means for the suppression of competition. There is no suggestion in the petition that either the lessor or the lessee was wanting in authority to execute the lease of 1885, or that there was any infirmity therein save that which arose from the allegation that at the time of the execution of the lease the lines of the lessor were, and before that time had been, in competition with the lines of the lessee.

(2) The case under the Pacific Railroad Laws may be separated into two compartments (a) an alleged cause of action grounded in the idea that the Pacific Railroad Laws were violated by the fact alone that one of the constituent Pacific Railroads (the Central Pacific) became the property (through the lease of 1885, followed by the stock purchase in 1899) of a company (the Southern Pacific) which was a competitor of another constituent Pacific Railroad (the Union Pacific), thereby creating a status which without more was unlawful; (b) an alleged cause of action based upon the claim that the operation of the Central Pacific by the Southern Pacific violated the Pacific Railroad Laws by not affording to the Union Pacific "equal advantages and facilities as to rates, time and transportation without any discrimination of any kind." (See Act quoted, Supp. Br., 153.) Here, again, there is no suggestion in the petition that either the lessor or the lessee was wanting in authority to execute the

lease of 1885, or that there was any infirmity therein save that which arose from the allegation that at the time of the execution of the lease the lines of the lessor were, and before that time had been, in competition with the lines of the lessee.

In the proofs the Government totally failed to show any improper practice upon the part of the appellees in respect of a denial or withholding of facilities or of any discrimination whatsoever, but on the contrary (as we have already stated) it was shown that in maintenance and in operation the Central Pacific had attained and maintained an excellence comparable with the best railroads of the country and far better than most of them.

The Government, however, argues that there has been a withholding of facilities from the Union Pacific and discriminatory practices against that company, on account of acts which we say do not fall within any definition of either of those terms. The Government contends that there has been such a withholding of facilities and such discriminatory practices because the defendants (*a*) have withheld co-operation with the Union Pacific in a one hundred per cent exchange of business and (*b*) because the ownership of the Central Pacific by the Southern Pacific has caused the Central Pacific to be indifferent to or opposed in interest to an increase in traffic and earnings of the Union Pacific-Central Pacific line.

The argument, therefore, as we have seen, is that the lease of 1885, followed by the stock purchase in 1899, created an unlawful status under the Pacific Railroad Laws. This argument, as we have also seen, flies in the face of that

portion of the decision in the Union Pacific case which affirmed the validity of the ownership by the Union Pacific of the Granger-Portland route, and the acquisition of a fifty per cent interest in the Ogden-San Pedro route (Main Br., 267, Maps XIII and XIV).

Furthermore, this argument denies to the Union Pacific the power to parallel the Central Pacific from Ogden to the Pacific Coast (say, by purchase of the present Western Pacific or by independent construction) and it also denies to the Central Pacific the power, even if divorced, to parallel the Union Pacific line from Ogden to the Missouri River (either through purchase or by construction).

It is to be noted further that the cause of action under the Pacific Railroad Laws is not grounded in the idea that there has been any violation of these laws "so far as the public and the Government are concerned" (see Act quoted in Supp. Br., 153). The Government's contention under the Pacific Railroad Laws is really, in its final analysis, an attempt to maintain a cause of action which if it exists at all is not in favor of the Government, but of the Union Pacific Company, which that company, however, has elected not itself to assert, even though there has been an act since 1874 providing for suits by persons and companies aggrieved by violations of the Pacific Railroad Laws (Supp. Br., 1854), and although the cause of action, if it exists at all, first arose as early as 1883, more than thirty years ago.

Indeed, the obligations of the Central Pacific as a connecting carrier have in the course of years been enlarged by modern legislation applicable to all of the connecting carriers in the country—and it is plain that had these laws of our time been in force in 1862, the special provisions in the

Pacific Railroad Laws would not have been introduced. Under the Transportation Act of 1920 every connecting carrier is bound to afford to its connections all of the facilities, etc., which were secured to the constituent Pacific Railroads by the Act of 1862 and amendments, and in addition there are other important facilities provided in the Act of 1920, which were not provided for in the Act of 1862 and amendments, or in any acts of those early days. Moreover, the Act of 1920 provides ampler and fuller legislation in matters of procedural law, as well as substantive law, and affords machinery whereby one carrier may have redress against another before the Interstate Commerce Commission for a violation of its substantive provisions, and furthermore provides that the awards of the Commission may be enforced by a District Court upon petition by the Commission.

In our briefs (Main Br., pp. 253-259; Supp. Br., 26-34) note is taken of two decisions made by the Interstate Commerce Commission, one before and one after the decree was entered below. (The decisions were in January and May, 1917, and the decree was entered in March, 1917.) These decisions arose out of an application by the Southern Pacific to the Interstate Commerce Commission under Section 11 of the Act of August 24, 1912, for permission to operate its steamers from the Gulf to New York, because it was a carrier having lines in competition, *i. e.*, one through Ogden and the other through El Paso, and the Interstate Commerce Commission dealt with these lines as in competition, but held that public interest justified the granting of the permission to maintain the steamers. If these lines had not been in competition, the permission of the Interstate Commerce Commission would not have been necessary.

We have already spoken of the incorrect use of the phrases respecting "facilities" and "discriminatory" practices which underlie the argument of the Government relating to the Pacific Railroad Laws. We come now to the incorrect use of terms underlying the argument based upon the Anti-trust Act. The Government speaks of "a *natural* competitor" (Petition, I. R., 12), meaning thereby not "a competitor" at all, but two units which might be made competitive by dismemberment. The Government also uses the word "combination," not to indicate an artificial joinder creating a new condition in place of one which existed before, but as indicating a single proprietorship of units which never existed independently but which the Government contends are capable of separation and could be operated competitively if in diverse ownership.

Chronological Outline of Facts (1846-1921).

1846-1861.

CALIFORNIA.—Military authorities of the United States took possession of California (1846). Mexico ceded California to United States (1848). California admitted to Union (1850). Memorials addressed to Congress by California Legislature for transcontinental road (1850-1859). Inaction of Congress due in part to dispute over location of route and problematical effect of transcontinental line on slavery question. Discussion of thirty-third and thirty-fifth parallels of latitude as probable line of future railroad.

OREGON.—The country called Oregon from Pacific Ocean to the Rocky Mountains between forty-second parallel (now southern boundary of Oregon) and forty-ninth parallel (now

northern boundary of State of Washington) acknowledged to be territory of this country in settlement of northwest boundary dispute with Great Britain (1846). Oregon created a territory with boundaries above mentioned (1848), which boundaries now embrace the states of Washington, Oregon, Idaho, etc. Oregon admitted to the Union (1859).

1861-1872—Central Pacific, Its Incorporation, Congressional Aid, and Lines Built by It.

Fort Sumter fired on in April, 1861. Incorporation under laws of California of Central Pacific Railroad Company of California (June 28, 1861), by four Californians—Leland Stanford, C. P. Huntington, Mark Hopkins and Charles Crocker. Act of Congress, July 1, 1862, created Union Pacific as federal corporation, incorporating one hundred and fifty-eight individuals and certain departmental officers of the Government. C. P. Huntington was one of the persons. The act authorized the Central Pacific to build eastward from Sacramento or the Pacific Ocean to meet the Union Pacific coming westward, and provided for Government bond aid and land grants, etc. The Act of 1864 enlarged the land grant and authorized the issuance of bonds having priority over the Government lien for advances in aid of construction. Central Pacific assigned to Western Pacific a portion of the construction which it was authorized to make, *i. e.*, from Sacramento to San Jose; and this assignment was approved by Congress (1865).

The Pacific Railroads were constructed from the Missouri River to the Pacific Coast (1864-1869):—(a) Omaha to Ogden by Union Pacific, (b) Ogden to Sacramento by Cen-

tral Pacific, and (c) Sacramento to San Jose by Western Pacific (Maps II and III). Non-bond-aided lines, (a) Niles to Oakland, (b) Lathrop to Goshen, and (c) Roseville to Redding (en route to Oregon), were constructed in California (1869-1872). (See Map IV.)

In 1870, the Central Pacific absorbed in consolidation, (a) the Western Pacific, which built from Sacramento to San Jose, (b) the Alameda Company which built from Niles to Oakland, (c) the San Joaquin Company which built from Lathrop to Goshen, and (d) the California & Oregon Company then building from Roseville north en route to the Oregon line.

1865-1872—Southern Pacific, Its Incorporation, Congressional Aid, and First Fifty Miles of Road Built by It.

Southern Pacific Railroad Company, incorporated under laws of California (1865), to build southerly from San Francisco on a line between the Pacific Ocean and the Coast Range for, say, 100 miles (to Tres Pinos), thence through the Coast Range into the heart of the San Joaquin valley, say, to Goshen, thence, say, to Yuma ($32^{\circ} 40'$) via San Diego ($32^{\circ} 40'$). (See Map V.)

This proposed route was evidently predicated upon the idea that Congress would authorize a transcontinental line along approximately the thirty-third parallel, reaching California at Yuma. Congress, however, did not at that time authorize such construction but passed the Atlantic and Pacific Act (1866) providing for a road along the thirty-fifth parallel, and authorizing the Southern Pacific to construct from San Francisco to a junction with the Atlantic and Pa-

cific at the place where the line would cross the California boundary—a point which later turned out to be Needles ($34^{\circ} 50'$, Map VI). *The Southern Pacific Railroad Company then abandoned the line of its proposed route south of Mojave, substituting therefor the line Mojave to Needles.*

In fulfilment of the conditions imposed by the Atlantic and Pacific Act, the Southern Pacific (a) acquired the local company which had constructed by 1864 the fifty miles from San Francisco to San Jose; (b) was the proprietor of a second company which built the thirty miles from San Jose to Gilroy in the year ending June 30, 1870, and (c) likewise became the proprietor of a third company which built the twenty miles from Gilroy to Tres Pinos in the year ending June 30, 1871. This hundred miles (San Francisco-Tres Pinos) is the only line of the Southern Pacific Railroad Company between the Pacific Ocean and the Coast Range referable to the Atlantic and Pacific Act. The only other construction by the company under that act was the line Goshen-Mojave-Needles, and 61 miles built westward from Goshen via Huron to Alcalde on the eastern slope of the Coast Range (Map VIII). The section from Tres Pinos to Alcalde was never built (Main Br., p. 36 foot-note). The construction under the Atlantic and Pacific Act was completed to Needles in 1883, when the Mojave-Needles section was leased to the Santa Fe, and later sold to it in 1911.

The precise date at which Stanford, Huntington, Hopkins and Crocker became connected with the Southern Pacific is not known but we do know that C. P. Huntington was interested therein as early as 1868, and it is undisputed that these four men were in control of the Southern Pacific Railroad Company in 1870, when it absorbed by consolida-

tion the companies which had constructed the lines (a) San Francisco to San Jose; (b) San Jose to Gilroy, and (c) Gilroy to Tres Pinos.

We now pass from the construction under the Atlantic and Pacific Act of July 27, 1866, to the construction under the Texas and Pacific Act of March 3, 1871. This act authorized the Texas and Pacific Company to construct a road along the thirty-second parallel through Yuma and into California, and authorized the Southern Pacific Railroad Company to build from Mojave through Los Angeles to Yuma, in the expectation that it would there make a junction with the Texas and Pacific building west. Thus the Southern Pacific Railroad Company, by lines diverging from Mojave, would connect San Francisco with two transcontinental roads (Map VI).

The two outstanding facts of this early period are these:

(a) When Congress passed the Texas and Pacific Act, authorizing the Southern Pacific to build to Yuma, Stanford, Huntington, Hopkins and Crocker were publicly known to be in control of both the Southern Pacific and Central Pacific; and (b) the Southern Pacific Railroad Company did not at this time own any trackage, and had not constructed any mileage, except the 100 miles from San Francisco to Tres Pinos (fifty miles purchased, and fifty miles built). The main line through the San Joaquin Valley (Goshen to Mojave under the Atlantic and Pacific Act) was not begun by the Southern Pacific until 1871, when in that year Stanford, Huntington, Hopkins and Crocker began building south from Goshen, the point where their Central Pacific line had stopped (Main Br., 36, 42). We deal with this construction in the next period.

1872-1883—Southern Pacific Construction, Lease of Operative Units to Central Pacific as Soon as Built, and Operation Thereof Under Name of Central Pacific and Leased Lines.

This period is devoted to Southern Pacific Railroad Company construction (a) from Goshen via Mojave to Needles under the Atlantic and Pacific Act, and (b) from Mojave via Los Angeles to Yuma under the Texas and Pacific Act, and (c) from Yuma eastward.

As already stated, the line to Needles was completed in 1883, and the Mojave-Needles section was leased to the Santa Fe in that year and sold to it in 1911. In 1877 the line from Mojave via Los Angeles reached Yuma, but there was no Texas and Pacific construction there to form a junction, and hence the Southern Pacific Railroad carried on through Arizona and into New Mexico, where it made its first junction. This occurred at Deming in 1881 when connection was made with the Santa Fe. Thence the construction proceeded through El Paso, where connection was later made with the Rock Island, to Sierra Blanca, Texas, where it met the Texas and Pacific in 1882. It then continued south and east by construction and the acquisition of two Texas and two Louisiana railway companies, opening the line to New Orleans in 1883.

It is to be noted that the Sunset-Gulf line here under review became a through line of the Southern Pacific Railroad not because originally so designed, but in consequence (either wholly or partially) of the fact that it was not met as contemplated by Texas and Pacific construction coming westward.

When the Sunset-Gulf route was opened to New Orleans in 1883, Central Pacific lines formed a part of that route and it was not until eight years afterward (1891) that it was possible to travel from San Francisco to New Orleans over Southern Pacific rails alone. This first became possible by reason of the building by the Southern Pacific of a second line of trackage through the San Joaquin valley for purely local purposes in 1891 (Map X). The now well-known Coast route from San Francisco to Los Angeles via Santa Barbara was not opened until 1901, eighteen years after the completion of the line to New Orleans (Map IX).

This summarizes the history of construction during the period 1872-1883. Two important facts remain to be noted.

(a) The Southern Pacific Railroad lines were built by the same crews and engineers as the Central Pacific; the equipment was interchangeable throughout the entire system; and there was identity of management in both construction and operation.

(b) As soon as the Southern Pacific Railroad operative units were constructed, they were turned over to the Central Pacific to be operated, and the system was everywhere known as "Central Pacific and Leased Lines."

1883-1885—The Completed Central Pacific-Southern Pacific System Operated as "Central Pacific and Leased Lines."

For two years after the opening of the Sunset-Gulf route, the entire Central Pacific-Southern Pacific system continued to be operated as "Central Pacific and Leased Lines." (See table of this leased mileage in *Central Pacific v. United States* (21 Ct. Cl., 180 [1886]; *aff'd* 118 U. S., 235 [1886].) The

Southern Pacific Railroad lines had, however, become the larger part of the system and this circumstance led to the events with which we are now to deal.

Southern Pacific Company of Kentucky was incorporated March 17, 1884. A few months later, Senator Stanford, Mr. Huntington, Mr. Crocker, and Mr. Timothy Hopkins, adopted son of Mark Hopkins (d., 1878), met in New York and agreed among themselves upon the leasing to the Southern Pacific of Kentucky of all the railroad lines then in operation under the name of Central Pacific and Leased Lines, etc. These conferences (of which formal minutes were kept), resulted in the leases of 1885, *i. e.*, the lease of the ~~Central Pacific~~ ^{Southern} lines, dated February 10, 1885, effective that day, and the lease of the ~~Southern Pacific~~ ^{Southern} Railroad lines on February 17, 1885, effective April 1, 1885.

1885-1899—Southern Pacific of Kentucky as Proprietor of Southern Pacific-Central Pacific System, and Congressional Proceedings Appertaining Thereto.

Throughout this period, the Southern Pacific of Kentucky operated the entire Southern Pacific-Central Pacific system under the leases of 1885, and the modifications of the Central Pacific lease of 1888, 1893, 1894, and 1897. (The report of the Secretary of the Interior for the year ending June 30, 1885 [p. 50], records the execution of the Central Pacific lease of 1885.) Congress had occasion frequently to review and consider the lease of 1885 and the above-mentioned modifications and the relations of the Central Pacific and Southern Pacific lines, as shown, in part, by the following events:

(a) January 27, 1886. House of Representatives called for all Southern Pacific Company leases, etc. (Main Br., 125).

(b) February 5, 1886. The President submitted to the House of Representatives all outstanding leases (Main Br., 125).

(c) March 3, 1887. Act passed creating United States Pacific Railway Commission to investigate the affairs of the Pacific Railroads (Main Br., 127).

(d) January 17, 1888. Report of the Commission, consisting of one volume accompanied by evidence taken (in ten volumes) (Main Br., 127).

(e) February 17, 1890. Report of Special Committee of the Senate upon report of United States Pacific Railway Commission, for convenience called the Frye-Davis Report (Main Br., 129).

(f) July 21, 1894. Report of House Committee on Pacific Railroads, for convenience called Reilly Report (Main Br., 131).

(g) January 28, 1895. Report of Senate Committee on Pacific Railroads, for convenience called the Brice Report (Main Br., 131).

(h) April 17, 1896. Mr. Gear introduced Senate Bill 2894, providing, among other things, for the refunding of the debt of the Central Pacific and for the guarantee thereof, etc., by the Southern Pacific Company (Main Br., 133).

(i) April 25, 1896. Introduction of H. R. 8189 by Mr. Powers, with a report in support thereof from the House Committee of Pacific Railroads, for convenience called the Powers Report, calling for, among other things, the assumption of the obligations of

the Central Pacific by the Southern Pacific Company (Main Br., 134).

(j) May 1, 1896. Report of the Senate Committee on Pacific Railroads in support of Senate Bill 2894 above mentioned, for convenience called Gear's 1896 Report (Main Br., 136).

(k) January 13, 1897. Mr. Gear, Chairman Senate Committee on Pacific Railroads, submitted copies of Southern Pacific leases furnished at Mr. Gear's request by C. P. Huntington in letter January 8, 1897 (Main Br., 138-139).

(l) January 13, 1897. Mr. Gear introduced Senate Bill 3522 providing for a commission and containing other provisions similar to those later incorporated in the act of July 7, 1898 (Main Br., 139-140).

(m) March 16, 1897. Mr. Gear introduced Senate Bill 119 to similar effect (Main Br., 140).

(n) April 1, 1897. Report of Senate Committee on Pacific Railroads in support of Senate Bill No. 119, called for convenience Gear's 1897 Report (Main Br., 140).

(o) July 12, 1897. Mr. Hepburn introduced H. R. 3750, providing for settlement of debt by commission of cabinet officers (Main Br., 146).

(p) December 7, 1897. Mr. Gear introduced an amendment to Senate Bill 119, making it more nearly conform to the later enactment of July 7, 1898 (Main Br., 146).

(q) June 29, 1898. Senate Committee on Pacific Railroads, through Mr. Morgan, offered certain amendments; some adopted and some rejected,

whereupon Mr. Morgan announced his support of the measure for the appointment of the commission (Main Br., 147).

(r) June 29, 1898. Amendment suggested by Senator White of California and agreed to (Main Br., 148).

(s) July 6, 1898. Amendment suggested in the House by Mr. Barham of California and debate closed by remarks of Speaker Cannon in support of the bill. Bill passed (Main Br., 148).

(t) July 7, 1898. President approved the bill and the commission became created by law (Main Br., 148).

Throughout the reports, the following points were repeatedly made:

(a) The Central Pacific had no practicable entrance into San Francisco; (b) the lien of the Government did not extend to the non-bond-aided lines; (c) the security possessed by the Government was inadequate because the Central Pacific, without the Southern Pacific lines to supplement it, was an incomplete property; (d) in any settlement the lease by the Central Pacific would have to be subordinated to the claims of the Government; and (e) the Southern Pacific should guarantee the payment of the Central Pacific debt.

1899-1901—The Settlement of the Central Pacific Debt, the Reorganization of the Company, and Confirmatory Legislation: Death of C. P. Huntington and Purchase of Control of Southern Pacific by Union Pacific.

February 16, 1899. Execution of agreement between United States of America, Central Pacific Railroad Company,

and Speyer & Co., which included, among other provisions, one which required the outstanding leases of the Central Pacific properties to be subordinated to the new issues of securities. This was later done.

February 18, 1899. *The Commercial & Financial Chronicle* published a summary of the reorganization (VI R., 2258).

February 20, 1899. Report to both Houses of Congress by Commission created by act of July 7, 1898, to settle Central Pacific debt, subject to approval of the President. Agreement accompanied report.

February 20, 1899. Speyer & Co. made public plan of reorganization of Central Pacific Railroad Company, on which agreement with Government was based. Notes of the Central Pacific Railroad Company to the United States of America of the face value of \$58,812,715.48 in the hands of the Secretary of the Treasury as reported by the Commission.

February 25, 1899. Full details of Speyer & Co.'s plan of reorganization published in *The Commercial & Financial Chronicle* (VI R., 2258-2268).

March 3, 1899. Act of Congress approved by President whereunder Secretary of the Treasury was authorized to sell any of the notes of the Central Pacific Railroad Company received by the Government—an act necessary to consummation of the provision in the agreement of February 1, 1899 (executed February 16, 1899), whereby Speyer & Co. agreed to purchase from the Government the four earliest

maturing notes of the Central Pacific Railroad Company and to pay therefor \$11,798,314.14.

March 10, 1899. Purchase by Speyer & Co. of these four notes and payment of \$11,798,314.14 therefor.

July-October, 1899. Reorganization of Central Pacific, issuance of bonds, subordination of lease from Central Pacific to Southern Pacific, guarantee of bonds by Southern Pacific, delivery to the Government of bonds, par for par, with Southern Pacific guaranty, to secure the sixteen unpaid Central Pacific notes then in the Government's hands.

March-October, 1899. *The Commercial and Financial Chronicle* contained articles dealing with settlement of debt and recording progress of reorganization (VI R., 2268-2279).

December, 1899. Attorney General's report showing settlement of the debt and reciting guarantee by Southern Pacific.

December 31, 1899. Reorganization of Central Pacific fully achieved before this date.

August 13, 1900. C. P. Huntington died, his associates having predeceased him: Mark Hopkins, March 28, 1878; Charles Crocker, August 14, 1888, and Leland Stanford, June 13, 1893.

March 3, 1901. Act of Congress (31 Stat., 1010, 1023) authorizing the Secretary of the Treasury to credit against the notes of the Central Pacific Railroad Company held in the Treasury of the United States interest on judgments which had been recovered for Government transportation by

the Southern Pacific Company and Central Pacific over non-bond-aided lines.

1901. Union Pacific purchased Southern Pacific stock theretofore held by C. P. Huntington and shortly afterward acquired other stock, building its total holding up to forty-six per cent of the Southern Pacific stock outstanding.

1901-1913—The Union Pacific Merger.

During this period of twelve years, the Union Pacific controlled the Southern Pacific, including the Central Pacific. In 1913, the control came to an end in consequence of the decree in *United States vs. Union Pacific R. Co.*, 226 U. S., 61 (1912). The action just mentioned was commenced in 1908, and was based upon the fact, among others, that until 1901 the lines operating through Ogden (C. P. and U. P.) were in "sharp, well-defined and vigorous" competition with the Sunset-Gulf route owned by the Southern Pacific; that the Southern Pacific was helpless to destroy that competition; that there was the same incentive for the competition that there would have been had the Southern Pacific not owned the Central Pacific; and that the Southern Pacific as a matter of self-preservation was compelled to co-operate with the Union Pacific (Main Br., pp. 192-200, 318-320; Supp. Br., 45-122). This theory of the Government was adopted by this court and is the basis of its decision in the Union Pacific case (226 U. S., 61).

1913-1914—The Failure of the Plan for Union Pacific Acquisition of the Central Pacific.

Upon the going down of the mandate in the Union Pacific case, it became necessary to devise a plan for the Union Pa-

cific to dispose of its stock in the Southern Pacific. In seeking a solution of this problem, the then Attorney General took the position that it was unlawful for the Southern Pacific to hold the Central Pacific and he declared that unless the Southern Pacific sold the Central Pacific to the Union Pacific he would bring a suit to dissolve the "combination" under the Anti-trust Act; but on the other hand, if the Southern Pacific would agree to part with the Central Pacific, he would see to it (a) that the Union Pacific paid a higher price therefor than could reasonably be expected at forced sale; and (b) that the Southern Pacific would be permitted to retain certain Central Pacific trackage indispensable to the Southern Pacific in a peculiar degree (Kruttschnitt, II R., 753, 755, 786). In these circumstances, the Southern Pacific, still under the control of the Union Pacific, and with a threatened suit in sight, took up negotiations with the Union Pacific for the acquisition by it of the Central Pacific. Terms were arranged which required the submission of the plan to the Railroad Commission of California, which refused to approve the same except upon conditions specified by it, which were not agreeable either to the Union Pacific or the Southern Pacific. The plan accordingly broke down and this action was brought in the following year. The plan broke down because the Union Pacific was not prepared to buy the Central Pacific unless it obtained in connection therewith important trackage facilities over rails of the Southern Pacific without which, it may be said, the Central Pacific is an incomplete property. The Railroad Commission was unwilling to give a preferential and exclusive privilege to the Union Pacific over Southern Pacific

rails and the Southern Pacific was unwilling to throw open its trackage to all railroad carriers.

In the course of their decision upon this subject, reviewing the traffic problems appertaining to the Central Pacific lines, both interstate and intrastate, the Commission said it was very doubtful whether interstate traffic would be improved by the dismemberment, but it was absolutely certain that intrastate commerce would be injured. They declared in terms "that there is room for grave fear that if the agreement is carried out this State will, instead of securing two strong competing lines, secure one dominant line and one much impaired line" (Main Br., p. 263).

1914-1921—Pendency of Present Suit.

This suit was brought February 11, 1914, heard December 1, 1915, and dismissed by decree filed March 9, 1917.

The Interstate Commerce Commission gave the Southern Pacific permission to continue to use its steamers from New Orleans to New York in January and May, 1917, under Section 11 of the Act of August 24, 1912, *i. e.*, Panama Canal Amendment to Interstate Commerce Act.

Also, in this period, the Transportation Act of 1920 has become a law, enlarging the duties of connecting carriers as amongst themselves and providing for redress through the Interstate Commerce Commission, which is empowered to apply to the District Courts in aid of their authority. The Interstate Commerce Commission is authorized to prevent discriminatory practices, to compel the furnishing of facilities, and generally to enforce mandatory and prohibitive provisions of a much more comprehensive nature than those contained in the Pacific Railroad Laws.